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Nolose Albert Raleshome v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–29–01 OF 2013 (LSO)
AZAHAR MOHAMED, ROHANA YUSUF AND ZAKARIA SAM JJCA
8 JANUARY 2014

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Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Whether there was material contradiction between oral testimony of chemist and her own chemist report — Whether trial judge erred when he failed to take into account material contradiction — Whether trial judge's finding with regard to material contradiction was serious misdirection — Whether appellant's conviction unsafe — Whether appellate interference warranted — Dangerous Drugs Act 1952

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Evidence — Witness — Expert witness — Chemist — Whether chemist was credible witness — Whether there was material contradiction between oral testimony of chemist and her own chemist report — Whether chemist would be presumed to have stated truth in chemist report — Whether chemist's evidence was essential to prove essential ingredient of offence — Criminal Procedure Code ss 180(1), (4) & 399(3)

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Acting on information received, a police party headed by Inspector Samsul bin Musa ('the inspector') had conducted an observation of a targeted area in Taman Connaught to wait for the arrival of a Gen-2 car ('the target motorcar'). While the police team lay in wait at the vicinity of the parked target car, a male of African descent ('the appellant') was observed getting into the target car alone carrying a black bag. The inspector and his team tailed the target motorcar. When the police car intercepted the target car, the appellant stopped his car and attempted to flee. The police team gave chase and apprehended him soon after. The inspector conducted a body search and recovered the car key from the appellant's trouser pocket. The car key was used to unlock the target car. The police then searched the target car and recovered a black bag, which was found to contain a package that was later confirmed by the chemist to be 707.5g of methamphetamine. The appellant was charged with trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952. At the conclusion of the trial, the trial judge convicted the appellant on the trafficking charge and sentenced him to the mandatory death penalty. This was the appellant's appeal against that conviction. The appellant's main ground of appeal was that the prosecution had failed to prove one of the essential ingredients of the charge, namely that the substance seized was methamphetamine weighing 707.5g. The appellant challenged the credibility

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of the evidence of the chemist and contended that the trial judge had erred when he failed to take into account the material contradiction between the oral testimony of the chemist and her own chemist report. According to the appellant this material contradiction was a serious non-direction, which amounted to a misdirection. The prosecution submitted that the chemist was a credible witness and that there was no plausible reason to disturb the findings of the trial judge.

Held, allowing the appeal:

(1) In accordance with the provisions of s 180(1) and (4) of the Criminal Procedure Code ('CPC'), it was the duty of the trial court to undertake a maximum evaluation of the credibility and reliability of all the evidence adduced so as to determine whether essential ingredients of the offence had been established. In the context of the present case, one of the essential ingredients of the offence, which the prosecution had to prove, was that the substance in question was in fact methamphetamine weighing in total 707.5g (see paras 12–13).

(2) During the examination-in-chief, cross-examination and re-examination of the chemist, she had testified that she had, in accordance with UN Guidelines, homogenised the substances before she carried out the analysis of the substance in question. However, the oral evidence of the chemist materially contradicted her own chemist report in that, she had stated in her report that the substance was homogenised during the analysis. According to s 399(3) of the CPC, the chemist was bound to state the truth in the chemist report, which was a document required by law to be in writing. That being the case, the chemist would be presumed to have stated the truth in the chemist report that the impugned substance had been homogenised into powder during analysis. This material contradiction assumed greater importance as the chemist's evidence was essential to prove that the impugned subject matter was methamphetamine weighing in total 707.5g. On account of the infirmities and poor quality of the chemist's evidence, there was doubt about her analysis, which was fatal to the prosecution's case (see paras 14, 17 & 18).

(3) The finding of the trial judge in regard to the material contradiction in the chemist's oral testimony and her own report was without any factual basis and was not even supported by the evidence of the chemist. In the circumstances the trial judge had seriously misdirected herself on the facts and law and this had the effect of rendering the conviction very unsafe, warranting appellate interference. The appeal was thus allowed on this ground alone (see paras 20–22).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima, pasukan polis yang diketuai oleh Inspektor Samsul bin Musa ('Inspektor tersebut') telah melakukan pemerhatian di kawasan yang disasarkan di Taman Connaught untuk menunggu ketibaan kereta Gen-2 ('kereta yang disasarkan'). Ketika pasukan polis menunggu di kawasan kereta yang disasarkan itu berparkir, seorang lelaki bangsa Afrika ('perayu') dilihat masuk ke dalam kereta yang disasarkan seorang diri dengan membawa beg hitam. Inspektor tersebut dan pasukannya mengekori kereta yang disasarkan itu. Apabila kereta polis menghalang kereta yang disasarkan itu, perayu menghentikan keretanya dan cuba melarikan diri. Pasukan polis telah mengejar dan menahannya sejurus selepas itu. Inspektor tersebut telah melakukan carian badan dan menjumpai kunci kereta daripada poket seluar perayu. Kunci kereta itu telah digunakan untuk membuka kereta yang disasarkan itu. Polis kemudian memeriksa kereta yang disasarkan itu dan menjumpai beg hitam yang didapati mengandungi bungkusan yang kemudian disahkan oleh ahli kimia sebagai methamphetamine seberat 707.5g. Perayu telah dituduh mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Di penutupan perbicaraan, hakim perbicaraan telah mensabitkan perayu dengan pertuduhan mengedar dadah dan menjatuhkan hukuman mati mandatori. Ini adalah rayuan perayu terhadap sabitan tersebut. Alasan utama rayuan perayu adalah bahawa pendakwaan telah gagal membuktikan salah satu inti pati penting pertuduhan, iaitu bahan yang dirampas adalah methamphetamine seberat 707.5g. Perayu telah mencabar kebolehpercayaan keterangan ahli kimia dan berhujah bahawa hakim perbicaraan terkhilaf apabila beliau gagal untuk mengambil kira perbezaan material antara keterangan lisan ahli kimia dan laporan kimianya sendiri. Menurut perayu perbezaan material ini adalah tanpa arah, yang membentuk suatu salah arah. Pendakwaan berhujah bahawa ahli kimia adalah saksi yang boleh dipercayai dan tiada sebab munasabah untuk mengganggu penemuan hakim perbicaraan.

Diputuskan, membenarkan rayuan:

(1) Menurut peruntukan s 180(1) dan (4) Kanun Tatacara Jenayah ('KTJ'), adalah kewajipan mahkamah pebicaraan untuk menjalani penilaian maksimum berhubung kebolehpercayaan semua keterangan yang dikemukakan untuk menentukan sama ada inti pati penting kesalahan dibuktikan. Dalam konteks kes ini, salah satu inti pati penting kesalahan, yang mana telah dibuktikan oleh pendakwaan, adalah bahan yang dipersoalkan adalah methamphetamine seberat 707.5g (lihat perenggan 12–13).

(2) Semasa pemeriksaan utama, pemeriksaan balas dan pemeriksaan semula ahli kimia, dia telah memberi keterangan bahawa dia telah, menurut Gari Panduan UN, menghomogen bahan itu sebelum dia menjalankan analisis ke atas bahan yang dipersoalkan itu. Walau bagaimanapun,

keterangan lisan ahli kimia berbeza sangat dengan laporan kimianya sendiri di mana, dia menyatakan dalam laporannya bahawa bahan itu telah dihomogenkan semasa analisis. Menurut s 399(3) KTJ, ahli kimia terikat untuk menyatakan yang benar dalam laporan kimia itu, yang merupakan dokumen yang dikehendaki secara bertulis oleh undang-undang. Jika begitu, ahli kimia dianggap telah menyatakan kebenaran dalam laporan itu bahawa bahan yang dipersoalkan telah dihomogenkan menjadi serbuk semasa analisis. Perbezaan material ini dianggap penting kerana keterangan ahli kimia adalah penting untuk membuktikan hal perkara yang dipersoalkan adalah methamphetamine seberat 707.5g. berdasarkan keterangan ahli kimia yang lemah dan kurang berkualiti, terdapat keraguan tentang analisisnya yang boleh mendatangkan mudarat kepada kes pendakwaan (lihat perenggan 14, 17–18).

(3) Penemuan hakim perbicaraan berhubung perbezaan material dalam keterangan lisan ahli kimia dan laporannya sendiri adalah tanpa apa-apa asas faktual dan tidak disokong oleh keterangan ahli kimia. Dalam keadaan berikut hakim perbicaraan telah salah arah dengan serius atas fakta dan undang-undang dan ini mempunyai kesan menjadikan sabitan itu tidak selamat, yang mewajarkan campur tangan mahkamah rayuan. Rayuan ini dibenarkan atas alasan ini sahaja (lihat perenggan 20–22).]

Notes

For cases on expert witness, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3236–3241.

For cases on trafficking, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 205–300.

Cases referred to

Lim Pah Soon v PP [2013] 6 MLJ 252, CA (refd)
PP v Ang Soon Huat [1991] 1 MLJ 1, HC (refd)
PP v Mok Kar Poh [2001] 5 CLJ 206, HC (refd)
PP v Ong Cheng Heong [1948] 6 MLJ 678; [1998] 4 CLJ 209, HC (refd)
PP v Sulaiman bin Mohamad Noor [1996] 1 MLJ 196, HC (refd)

Legislation referred to

Criminal Procedure Code ss 180(1), (4), 399(3)
Dangerous Drugs Act 1952 s 39B(1)(a), (2)

Appeal from: Criminal Trial No 45–21 of 2011 (High Court, Kuala Lumpur)

Karpal Singh (Zaleha Al-Hayat with him) (Karpal Singh & Co) for the appellant.
Munahyza Mustafa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azahar Mohamed JCA (delivering judgment of the court):

[1] Nolose Albert Raleshome ('appellant'), a citizen of Lesotho was charged and tried for trafficking in 707.5g of methamphetamine before the Kuala Lumpur High Court, an offence in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'), and punishable with mandatory death penalty prescribed under s 39B(2) of the DDA.

[2] The offence was said to have been committed on 30 December 2010 at about 12.00pm at the parking space of Food Court 118, Jalan 9, Taman Len Seng, in the District of Cheras, Federal Territory of Kuala Lumpur.

[3] The learned High Court judge, at the conclusion of the trial, convicted the appellant on the charge and sentenced him to the mandatory death penalty and against that conviction he had appealed to this court.

[4] We heard his appeal and after hearing oral arguments, we reserved judgment. We now give our judgment.

[5] Acting on information received, at about 11.00am on 30 December 2010, a team of police officers led by Inspector Samsul bin Musa ('PW7') headed towards Taman Connaught, Cheras. Earlier, PW7 had received information that a Gen-2 car bearing registration No WMX 9669 ('the target car') was being used for drug trafficking activities at Taman Connaught. The police team arrived at the targeted area at about 11.30am. Not long after that, PW7 was informed by SM Nurazlee bin Ismail ('PW8') that he had seen the target car in front of the Alliance Bank. Then, PW7 approached the target car but had found it empty. After that PW7 directed his team to carry out surveillance at the vicinity of the target car.

[6] At about 12.15pm, PW7 was informed that 'a male of African descent' (later identified as the appellant) was seen carrying a black bag and heading in the direction of PW7's vehicle, which was positioned 15 meters behind the target car. At that moment, PW7 saw the appellant pass by his vehicle. PW7 observed the appellant getting into the target car alone and carrying a black bag. The appellant then started the engine and the car moved forward. PW7 and his team swung into action, following the target car from the rear. The distance between the target car and PW7's vehicle was less than 10 meters. PW7 did not lose sight of the target car at any time. PW7 and his team tailed the target car to Taman Len Seng.

[7] On arrival at Taman Len Seng, the target car entered into the area of the

vicinity of Taman Len Seng Food Court. There, PW7 intercepted it. The appellant stopped the target car and he attempted to flee. PW7 and his team followed in pursuit of the appellant. PW8 was not involved in the pursuit of the appellant and he was tasked with standing watch over the target car. The appellant was apprehended soon after. At that time, the appellant was not carrying anything.

[8] PW7 conducted a body search of the appellant at the place where he was apprehended and recovered the car key from the appellant's front trousers pocket. PW7 brought the appellant to the target car which he was driving earlier. PW7 used the car alarm and found it to be functioning. The target car was found to be locked. Using the car key, PW7 opened the door of the target car and recovered a black bag. After some conversation with the appellant, PW7 pierced the black bag and found in it a black package. PW7 then placed the package in its original place, zipped up the bag and brought the appellant and the bag to the police headquarters. At the police headquarters, a thorough examination was made of the target car but nothing incriminatory was found. The appellant was brought to PW7's office. There, PW7 took out the black package from the bag, opened the package by using a pair of scissors and found in it substance suspected to be dangerous drugs.

[9] The package was then sent to the Chemistry Department for chemical examination and analysis. The package was later confirmed by the chemist, Muzaiyanah bt Mohd Kaprawi ('PW4') to contain 707.5g of methamphetamine.

[10] In the petition of appeal, the appellant attacked the judgment of the learned High Court on a number of grounds. What turned out to be of critical importance in the course of the arguments before this court is the ground that the conviction of the appellant is unsafe for the reason that the prosecution has failed to prove one of the essential ingredient of the charge, namely that the substance was methamphetamine weighing 707.5g. This is the focus of our judgment. Mr Karpal Singh, learned counsel for the appellant argued that the learned High Court judge erred in not concluding the evidence of PW3, the chemist was not credible. This is because the substance sent to her for analysis had been homogenised into powder during analysis when, clearly, homogenisation had to be conducted on the substance before analysis. Learned counsel further argued that the oral evidence of PW3 is materially contradicted by her own chemist report and that the learned High Court judge has failed to take into account this material contradiction. He then argued that this is a serious non-direction which amounts to a misdirection.

[11] In resisting the appeal, Puan Munahyza bt Mustafa, learned deputy public prosecutor ('DPP') argued that PW3 is a truthful and credible witness.

Both during cross-examination as well as during re-examination, she had confirmed that homogenisation would have to be done before analysis. It was argued by learned DPP that with regard to the identity and the weight of the offending substance, PW3 had testified that she had thoroughly homogenised the substance before analysis. Learned DPP then brought to our attention that PW3 had conducted qualitative tests to determine the type of drugs and with regard to the weight of the methamphetamine, PW3 proceeded with the quantitative tests and found out that it contained 707.5g of methamphetamine. According to the learned DPP, the learned High Court had accepted the evidence of PW3. She then argued that there was no plausible reason for this court to disturb the finding of the learned High Court judge.

[12] On the facts of the present case, we find there is much force in Mr Karpal Singh's argument. Now, in accordance with the provisions of s 180(1) and (4) of the Criminal Procedure Code ('CPC'), it is the duty of trial court to undertake a maximum evaluation of the credibility and reliability of all the evidence adduced so as to determine whether each and essential ingredients of the offence has been established, in order to make a finding whether or not the prosecution has made out a prima facie case against the accused (see: *Lim Pah Soon v PP* [2013] 6 MLJ 252). Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon should be rejected (see: *PP v Ong Cheng Heong* [1998] 6 MLJ 678; [1998] 4 CLJ 209 and *PP v Mok Kar Poh* [2001] 5 CLJ 206).

[13] In the context of the present case, one of the essential ingredients of the offence which the prosecution must prove is that the substance in question is in fact methamphetamine weighing in total 707.5g. This then brings into focus the evidence of PW3. In this regard, the material part of the evidence of PW3 in examination- in-chief is as follows:

> Ujian — Saya telah menjadikan bahan kristal jernih ini sebagai serbuk yang homogenasi dan kemudian saya telah menjalankan 2 analisa iaitu:
>
> 1. Analisa kualitatif — terdiri daripada 2 ujian:
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> a) Ujian wama mengunakan bahan uji marquis dan bahan uji simon. Ujian ini memberi warna oren dan biru. Ini menunjukkan bahawa terdapat jenis Methamphetamine dalam bahan yang diterima;
>
> b) Ujian menggunakan peralatan Bas Chromatography Mass Spectometry (GCMS). Hasil analysis ini saya mengesahkan bahawa bahan diterima mengandungi Methamphetamine.
>
> 2. Ujian kuantitatif untuk menentukan berat dadah Methamphetamine. Hasil daripada timbangan dan analisa, saya dapati bahawa bahan kristal Ini mengandungi 707.5 gram Methamphetamine.
>
> Semua ujian ini disyorkan oleh United Nations.

The important point that come out of PW3's evidence in examination-in-chief, as highlighted above, is that she had homogenised the substance before she carried out the analysis of the substance in question.

[14] It is significant to note that in the course of giving evidence in her examination-in-chief, PW3 tendered the chemist report which she had prepared and signed. This document was marked as exh P9. We will say more about exh P9 later in this judgment. At this juncture, it is important for us to refer to the evidence of PW3, where under cross-examination she tendered the UN Guidelines which was marked as exh D1. In accordance with the UN Guidelines, under cross-examination PW3 emphasised the importance of homogenising the substance before analysis. This is made clear in the following excerpt of PW3's testimony:

> Sebelum analisis, bahan perlu di homogen dulu. Bukan semasa. Ya, menurut UN Guidelines, proses homogenisation tidak boleh dibuat semasa analisis.
>
> Ya, apa yang dalam UN Guidelines adalah sedang untuk diikuti. Sahkan dalam keterangan saya telah menghomogen bahan sebelum buat analisis. Setuju, mesti sebelum dan tldak boleh semasa analisis.

[15] Again, in re-examination, PW3 reiterated that homogenisation must first be done before analysis. In the words of PW3 in re-examination:

> Setelah buat timbangan kasar dan mendapat nilai kasar besar bahan, saya telah menjadikan bahan menjadi homogen sebelum buat analisis.

[16] Coming back now to exh P9. It is to be noted that exh P9 is a report entitled 'LAPORAN Dl BAWAH SEKSYEN 399 KANUN TATACARA JENAYAH'. It must be borne in mind that according to s 399(3) of the CPC, PW3 is bound to state the truth in exh P9. Therein lies the flaw of the evidence of PW3, wherein in exh P9 she truthfully states, with the necessary emphasis, as follows:

> Saya Muzaiyanah Mohd Kaprawi, Ahli Kimia dalam Perkhidmatan Kerajaan Malaysia dengan ini memperakui bahawa pada jam 1206 pada 18 Januari 2011 telah diserahkan kepada saya oleh INSP MOHD TAHZIR BIN HUSAIN satu sampul surat bertanda 'TH' dan bermeterai 'POLIS DI-RAJA MALAYSIA 422'. Saya telah memeriksa sampul surat 'TH' dan mendapati di dalamnya satu balutan kertas karbon diperkuat pita pelekat bertanda 'TA' berisi satu kertas sampul diperkuat dengan pita pelekat bertanda 'TB' mengandungi satu bungkusan plastik yang diperkuat pita pelekat bertanda 'TC'. Bungkusan plastik ini mengandungi 995.2 gram (berat bersih) bahan Kristal jernih. Setelah dianalisis saya mendapati bahan tersebut mengandungi 707.5 gram methamphetamine.

Bahan tersebut di atas telah dijadikan serbuk yang homopen semasa dianalisis. Selepas itu bakinya dimasukkan ke dalam paket plastik berasingan (dibekalkan oleh saya) dan ditandakan dengan Nombor Makmal yang tersebut di atas. Methamphetamine adalah disenaraikan dalam Jadual Pertama Akta Dadah Berbahaya 1952.

[17] In our view, clearly, the oral evidence of PW3 is materially contradicted by her own chemist report, exh P9. In her oral evidence, she said she had homogenised the substance before analysis, whereas in exh P9, she stated that the substance was homogenised during analysis. Exh P9 is a document required by law to be in writing. More than that, as we have emphasised earlier, PW3 is bound to state the truth in exh P9. That being the case, PW3 must be presumed to have stated the truth in exh P9 that the impugned substance had been homogenised into powder during analysis. In this regard, the learned High Court judge had failed to evaluate and scrutinise the evidence of PW3 in the light of this glaring and material contradiction. We have carefully and anxiously considered the entirety of the evidence of PW3 on this critical issue. In view of the unsatisfactory feature, it is difficult for this court to conclude with any degree of certainty that PW3 had homogenised the substance before analysis, as required by the UN Guidelines. PW3's evidence was not satisfactorily adduced in this case.

[18] In any drug trafficking case, the evidence of the chemist as an expert witness must be satisfactorily and adequately adduced to prove that the impugned drug is a 'dangerous drug' as defined in the DDA. In this regard, it is of utmost important that when testifying in court as well as writing report, chemist must be meticulous and precise in the use of words, particularly in a case that attracts the mandatory death penalty (see: *Public Prosecutor v Ang Soon Huat* [1991] 1 MLJ 1 and *Public Prosecutor v Sulaiman bin Mohamad Noor* [1996] 1 MLJ 196). This contradiction assumes greater importance as PW3's evidence is essential to prove that the impugned subject matter is methamphetamine weighing in total 707.5g. The whole prosecution case centered around the evidence of PW3 before the High Court pertaining to this essential element of the charge against the appellant. On account of the infirmities and poor quality of PW3's evidence, there is doubt about her analyses. This is fatal to the prosecution's case; it has the effect of striking at the very essence of the prosecution's case.

[19] Even more, the learned High Court judge seriously misdirected herself on the fact and law when she arrived at the following finding:

The court has also carefully considered the words 'before' ('sebelum') and 'during' ('semasa'). In the context of the analysis of drugs, the court is of the view that the homogenization of the drugs at the start of the process of analysis, whether before or just after the colour tests, could still be viewed as being done 'during' or 'semasa'

analysis. This is because the analysis of drugs is a process. The court is of the considered view that homogenisation at the start of the process and before the chemical testing could also be termed as 'semasa' analysis.

[20] We find the finding of the learned High Court judge is without any factual basis and is not even supported by the evidence of PW3. There was no evidence placed before the learned High Court judge to enable her to make such a finding.

[21] In our judgment, the irrefutable fact remains that PW3 had made a previous written statement, in which she was bound to state the truth, which was materially inconsistent with her evidence in court. On a given set of facts, the oral testimony of PW3 is irreconcilably in conflict with her own chemist report, which has the effect of rendering the conviction very unsafe, warranting appellate interference.

[22] This appeal is, therefore, allowed on this ground alone. In the light we take of this appeal, it is not necessary for us to deal with the other grounds raised by learned counsel. The appellant should have been discharged and acquitted by the learned High Court judge without his defence being called on this ground alone.

[23] Accordingly, we unanimously quashed and set aside the conviction and the death sentence against the appellant. The appellant is acquitted and discharged.

Appeal allowed.

Reported by Kohila Nesan